

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

MOBILE BAYKEEPER, INC.,

Plaintiff,

V.

ALABAMA POWER COMPANY,

Defendant.

CASE NO.: 1:22-cv-00382-KD-B

NOTICE OF OPINION PROVIDING ADDITIONAL AUTHORITY

Plaintiff Mobile Baykeeper (“Baykeeper”) hereby notifies the Court of additional case authority pertinent to Baykeeper’s pending Motion to Reconsider. Doc. 111. On June 28, 2024, an important Opinion was released in *Electric Energy, Inc., et al. v. U.S. EPA*, No. 22-1056 (D.C. Cir. 2024) (“Opinion”) (attached as Exhibit 1), pending in the United States Court of Appeals for the District of Columbia Circuit.¹ This Notice is submitted after the close of briefing because the Opinion was released approximately five months after Baykeeper filed its Motion to Reconsider on February 1, 2024.

In the Opinion, the D.C. Circuit ruled that EPA’s determination that the 2015 CCR Rule prohibits closure of a coal ash impoundment with waste in contact with groundwater does not constitute an amendment of the Rule, stating: “The 2015 Rule, standing on its own, makes clear that operators cannot close their surface impoundments with groundwater leaching in and out of

¹ Pursuant to Civil Local Rule 7(f)(3), parties may notify the Court of pertinent and significant authority which comes to a party's notice after briefs have been filed, but before decision has been rendered. The Rule requires the noticing party to advise the Court why the authority was not cited in the party's brief, and to cite the page(s) of the brief(s) already filed which relate to the additional authority.

the unit and mixing with the coal residuals.” Exhibit 1 at 15. The Court found that EPA’s conclusion was a “straightforward application” of the Rule’s text, not the creation of a new rule or requirement. *Id.* The Court rejected the argument that under the 2015 Rule groundwater is not a “free liquid” that must be eliminated for compliant closure. Finally, the Court ruled that compliant closure under the text of the Rule requires that operators prevent liquids from “infiltrating” an impoundment laterally, or from any direction, not just vertical penetration of water through the final cap, as Alabama Power has contended in this case. *Id.* at 16-17.

The D.C. Circuit’s Opinion provides additional authority supporting Baykeeper’s ripeness argument that its members are presently suffering injuries arising from current violations of the 2015 Rule’s performance standards relating to free liquids, infiltration of liquids, and future impoundment, as set forth in the Motion to Reconsider. Doc. 111 at 18-24.

Respectfully submitted this 8th day of July 2024.

s/ Barry A. Brock
Barry A. Brock
One of the Attorneys for Plaintiffs

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CERTIFICATE OF SERVICE

I hereby certify that, on July 8, 2024, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system, which will send notification of the filing to all counsel of record.

s/ Barry A. Brock

Barry A. Brock

One of the Attorneys for Plaintiffs